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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 687-688

UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION and UNITED NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, as owners of the Pilot Boat *Sandy Hook*, in their own behalf, etc.,

Libelants-Petitioners,

against

The Norwegian passenger Motor Ship *Oslofjord*, etc.,

and

DEN NORSKE AMERIKALINJE A/S (The Norwegian America Line), a Norwegian corporation, and owner of the motorship *Oslofjord*,

and

OIVIND LORENTZEN, as Director and Curator of Shipping of the Royal Norwegian Government, on behalf of The Royal Norwegian Government and of DEN NORSKE AMERIKALINJE A/S,

Respondents.

And Cross Suit.

PETITION FOR WRITS OF CERTIORARI.

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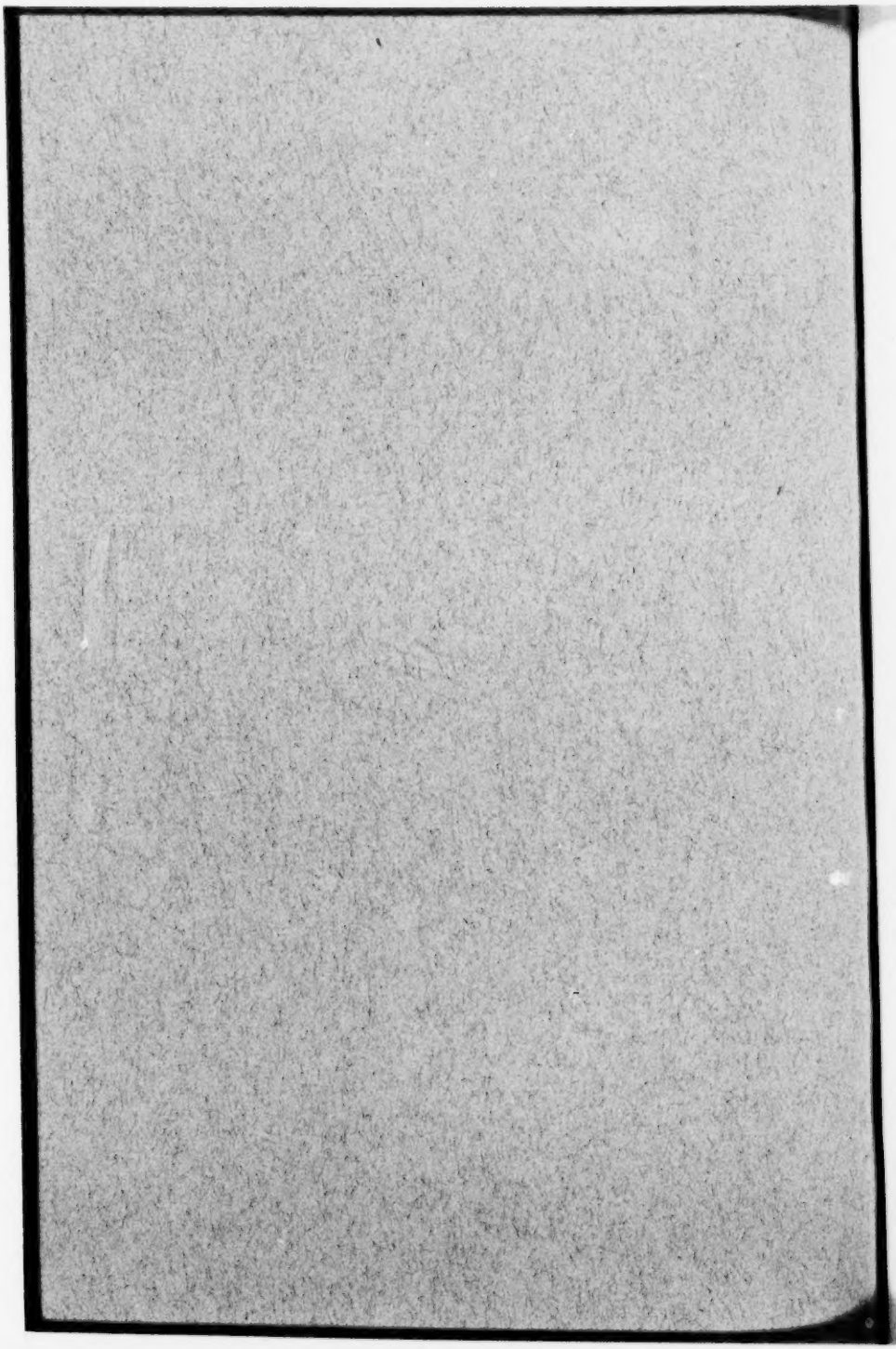

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October Term, 1941, No.....

PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, United New York Sandy Hook Pilots Association and United New Jersey Sandy Hook Pilots

Association, as owners of the steam pilot boat *Sandy Hook*, pray that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Second Circuit, R. 378-380, entered July 12, 1941, affirming the decrees in Admiralty of the Southern District of New York, R, 346-348.

The opinion of the District Court is reported in 35 Fed. Supp. 150; and, the opinion of the Circuit Court of Appeals, dated June 19, 1941, is reported in 1941 A. M. C. 1150. R. 370-373.

The petitioners respectfully show unto this Court as follows:

Jurisdiction.

Jurisdiction of this Court is provided by §347(a) of Title 28 of the United States Code.

I.

Statement of Matters Involved.

(a) *The Circumstances.*

This litigation arose out of collision in an unusually dense fog, about a half mile South by East of Ambrose Light Vessel, marking the approach to New York Harbor, outside of the limits of Inland waters, on the morning of April 27, 1939, at 6.23½ a.m., between the steam pilot boat *Sandy Hook* and the Norwegian passenger and freight vessel, the *Oslofjord*, resulting in the sinking of the *Sandy Hook*, and in damage to the stem of the *Oslofjord*. Both vessels had been sounding fog signals for a considerable period before the collision. The *Sandy Hook*, in addition to the regulation fog signals, was also sounding the special pilot boat signal prescribed by the Rules. The pilot boat *Sandy Hook* after placing a pilot aboard an inbound steamer somewhat to the westward of Ambrose Light Ves-

sel, and having heard the fog signals of another vessel (the *Oslofjord*) approaching the harbor, on the pilot boat's port bow, started her engines "slow ahead", and proceeded on a South South Easterly course, in order to place a pilot on board the incoming vessel, the *Oslofjord*. The *Oslofjord*, westward bound, toward the southward of Ambrose Light Vessel, heard the pilot boat's fog signals, and special pilot boat signals, twenty (20) minutes or more prior to the collision, R. 162, 169, from the starboard bow (about 15° or less), R. 195-197, and thus well forward of the starboard beam of the *Oslofjord*. The *Oslofjord* continued ahead at a speed of admittedly eight (8) to nine (9) knots, R. 197; and, although she subsequently stopped her engines (6.10 a.m. to 6.19 a.m.) because of the close proximity of a tug and tow on her port side, she continued running her way off during this interval, and at the same time altered her course toward the direction from which the *Sandy Hook's* whistle signals were heard. The *Oslofjord* then started her engines ahead again, at 6.19 a.m., during which time the *Sandy Hook* was proceeding slowly outward to meet the *Oslofjord;* and, the *Oslofjord* continued her engines in ahead motion, until 6.22 a.m., only a minute and a half (1½) before collision occurred, when her engines were stopped, but her headway continued. Owing to the extreme density of the fog, the vessels did not sight each other until they were close aboard, the visibility being "not over 250 feet", R. 344, fols. 1030-31. Those in charge of the *Sandy Hook* endeavored to swing her bow away from the *Oslofjord* under a starboard helm, but this maneuver [*in extremis*] was unsuccessful, as the *Oslofjord*, although having belatedly reversed her engines at this time (6.23 a.m.), struck the port side of the *Sandy Hook* with considerable force, penetrating into the iron side and deck of the *Sandy Hook* to a depth of about eight (8) feet. Efforts were made to

beach the *Sandy Hook*, but they were unsuccessful, and she sank and became a total loss. R. 112-113.

The *Oslofjord* was admittedly moving ahead at a rate of speed of from one (1) to one and a half (1½) knots at the very moment of contact. R. 172, 341.

(b) *The Decisions Below.*

The *Sandy Hook* was held solely at fault by the District Court, affirmed by the Circuit Court of Appeals, on the ground that she altered course across the course of the *Oslofjord* without having ascertained the *Oslofjord's* course. R. 343.

The Circuit Court of Appeals viewed the situation as one in which the navigators of the *Sandy Hook* supposed that the *Oslofjord* had stopped; but, the testimony shows that those in charge of the *Sandy Hook* had heard the single blast signals of the *Oslofjord* [indicating that she had *not* stopped], after the assumed mistake in distinguishing the *Oslofjord's* signals, and that the *Sandy Hook's* navigation was not affected by that incident. R. 66-67, 108, 120. The Circuit Court of Appeals, in its written opinion and decision, stated, in reference to the *Sandy Hook's* continuing her approach to the *Oslofjord*: "*While this navigation was not indeed a fault*, nevertheless it must be judged as though she had known the facts." [Italics ours.] R. 370, fol. 371.

But, the Circuit Court of Appeals, having stated that: "the gravamen of the appeal is the *Oslofjord's* fault", R. 371, fol. 371, and that: "The *Sandy Hook* insists that she violated both commands of Article 16 of the International Rules", R. 371, fol. 372; proceeded to exonerate the *Oslofjord* as to these two charges, which, so we contend, constituted clear violations of the statutory mandates of Article 16 of the International Rules [and of the Inland

Rules], both with respect to failure to stop her engines on hearing the fog signal of another vessel forward of her beam, and for not navigating "with caution" thereafter.*

These petitioners seek a review of the lower Court's interpretation of the legal intendment of Article 16, therefore.

II.

Questions of law presented.

1. What is the meaning of the apparently controlling phrase in the statutory enactment embraced in the second paragraph of Article 16 of the International Rules (**footnote*), which reads: "The fog signal of a vessel, the position of which is not ascertained"?

2. Assuming that the vessel by which the fog signal is sounded is not in sight, what is meant by the word "position" in the said Rule, as to its ascertainment by the vessel hearing such a fog signal?

3. Does not the Rule make it compulsory on the moving vessel to "stop her engines" on hearing the fog signal of the obscured vessel, if there be any doubt whatever as to the "position" of the obscured vessel?

---

* Article 16, identical in both International and Inland Rules, reads as follows:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> "A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." [Act of Aug. 19, 1890, c. 802, §1; 26 Stat. 326.]

Confirmed and re-enacted by the "International Convention for Safety of Life at Sea, 1929", on May 31, 1929.

III.

Reasons for allowance of writs.

1. The decision of the Circuit Court of Appeals misinterprets and misapplies the statutory enactments of Congress governing navigation of vessels in fog, and, completely nullifies and subverts the intendment and the mandate of the statute, in that the moving vessel here, the *Oslofjord*, which admittedly violated the second paragraph of the aforequoted Article 16, was completely exonerated therefor.

2. The decision conflicts with the rulings of other Maritime Courts relating to navigation in fog, and is in direct conflict with the weight of authority on the subject.

3. The decision here leaves the important question of navigation of vessels with respect to each other in fog in uncertainty, if not in confusion; the paramount importance of the statutory enactment as expressed in the aforesaid quoted Rule, Article 16, fully justifies a review of this particular case by this Honorable Court.

IV.

Argument.

(a) *The requirements of the Rule (second paragraph, Article 16) are mandatory.*

The Rule was formulated as a result of extensive debate and careful consideration by the "International Marine Conference", which was assembled in Washington, D. C., in 1889. The Rule, as formulated by the Conference, was adopted by the Congress the following year.

The following extract from the Protocols of this Conference, as reported by the "Committee" having this subject under consideration, is here requoted, from Volume I, page 85, of the Protocol, to emphasize the intention of the framers of the Rule to make its requirements compulsory:

> "We consider it worthy the attention of the Conference whether the custom followed at present by careful seamen of slowing or stopping on hearing the fog signal of another ship not in sight, *unless certain of her bearing and distance*, could be made compulsory by a regulation so worded as not to relieve those in charge from full responsibility." (Italics ours.)

The italicized language above quoted clearly indicates that it was the intention to fix the "position" of the obscured vessel; that is, not only to the extent of ascertaining that the obscured vessel was "apparently forward of her beam", but that there should be a more definite and positive ascertainment of the other vessel's position, approaching a certainty, as to not only her "bearing" but her "distance".

(b) *The Oslofjord had not "ascertained" the "position" of the Sandy Hook within the meaning of the Rule, which Rule the Oslofjord admittedly disregarded.*

This is shown by the testimony of the master of the *Oslofjord* in answers to questions propounded by the Court:

> "By the Court:
>
> "Q. I understand that when you got to this point here, which is the intersection between this line showing your course and the bearing line, that then you heard some whistles from the pilot ship? A. Yes, we heard also Ambrose Lightship from 6:00

o'clock. I did not take the time exactly when we started to hear it.

"Q. Do I understand that all you mean in this discussion with Mr. McGrann is that the pilot ship appeared to be to the left of Ambrose Lightship? A. Yes.

"Q. You do not mean to say that it was not southerly of the lightship, or farther west of the lightship? A. No, you could not tell that". R. 195-196, fols. 585-586.

(c) *The Circuit Court of Appeals erred by wrongly interpreting the significance and importance of "ascertaining" the position of the Sandy Hook, as required by the Rule.*

The Court said in its opinion that the *Sandy Hook* was assumed to be in the vicinity of Ambrose Light Vessel, and concluded that: "The Rule imposes no duty of stopping the engines, unless the signal be from 'a vessel the position of which is not ascertained' ". R. 371-372. But, it could not have been known to the *Oslofjord* what course the *Sandy Hook* was pursuing, or later pursued; and, it could not have been known what distance separated the *Sandy Hook* and the *Oslofjord*, as both vessels were in dense fog.

This Court has heretofore recognized the difficulty, if not the impossibility, of determining the position of a vessel in fog with any degree of certainty. We requote the language of Mr. Justice Brown in the case of *The Umbria*, 166 U. S. 404, 408, referred to with approval by this Court in the case of *The Beaver-The Selja*, 243 U. S. 296:

> "It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance."

(d) *The Oslofjord's failure to comply with the Rule, by failing to stop her engines on hearing the Sandy Hook's signals, caused or contributed to the collision.*

It is obvious that a compliance with the Rule by the *Oslofjord* would have brought her into a position well clear of the *Sandy Hook* when the vessels finally came into sight of each other, by retarding her progress (and advance) ahead. The situation here is very similar to that in the case of *The Beaver-The Selja* (*Lie* vs. *San Francisco & Portland SS Co.*), decided by the Circuit Court of Appeals of the Ninth Circuit, 219 Fed. 134; and, affirmed by this Court, 243 U. S. 291. In that case, the "*Selja*", in fog, heard the fog whistle of the "*Beaver*" forward of the "*Selja's*" beam, sixteen (16) minutes before the collision; and, although the "*Selja*" reduced her speed considerably, she did not stop her engines on hearing the "*Beaver's*" fog whistle, as required by the Rule. Circuit Judge Ross, after finding that the "*Selja's*" engines were not stopped until ten (10) minutes after the first fog whistle of the "*Beaver*" had been heard, stated: "No amount of argument, no matter how ingenious and clever, can justify a court in ignoring the plain provisions of statute law." Page 137.

Mr. Justice Clarke, in delivering the opinion of this Court, affirming the decision of the Circuit Court of Appeals of the Ninth Circuit, intimated that it was immaterial whether or not the "*Selja*" had come to a standstill at collision, because, so he stated: "the evil had been done and the collision rendered inevitable", by failure of the "*Selja*" *to comply with the Rule.* 243 U. S. 298.

Moreover, the "*Oslofjord*" violated the Rule, apart from her failure to stop her engines, in that she did not "*navigate with caution until danger of collision is over*", but altered course and continued her headway into collision. *Ante,* pp. 3-4.

(e) *Having violated a statutory rule, it was incumbent upon the* Oslofjord *to show that the violation not only did not contribute, but could not have contributed, to the collision.*

That rule of evidence is firmly established: *The Pennsylvania*, 86 U. S. (19 Wall.) 125; *The Beaver-The Selja* (*Lie* vs. *San Francisco & Portland S. S. Co.*), 243 U. S. 291. The burden on the *Oslofjord* has certainly not been sustained in the present case.

Wherefore, these petitioners respectfully pray that writs of certiorari may be issued by this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, to the end that this probably most important of all statutory enactments governing the navigation of vessels with respect to each other, should be reviewed and clarified by this Honorable Court.

[A certified copy of the transcript of record of all proceedings in the District Court and the Circuit Court of Appeals is presented herewith.]

United New York Sandy Hook Pilots Association and United New Jersey Sandy Hook Pilots Association, Petitioners,

By W. H. McGrann,
Attorney.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Honorable Court, and that it is not filed for the purpose of delay.

W. H. McGrann.

New York, N. Y.,
October 6, 1941.